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NOV 9 1959
JAMES R. BROWNING, Clerk

No. 460

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

CLIFFORD B. DYE,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

MOTION FOR LEAVE TO FILE A SUPPLEMENT TO A PETITION FOR WRIT OF CERTIORARI ALREADY FILED IN THE ABOVE ENTITLED CAUSE AND SUPPLEMENT TO A PETITION FILED OCTOBER 9, 1959 FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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SUBJECT INDEX

	Page
Motion for Leave to File a Supplement to a Petition for Writ of Certiorari already filed in the above entitled cause	1
Supplement to a Petition filed October 9, 1959 for Writ of Certiorari to the Supreme Court of Michigan	3
Question for Review referred to as Question 3a for the Reason that it is related to Question 3 and the Argument made in regard to Question 3 is partly applicable to Question 3a here submitted	3
Argument on Point 3a	4
Supplement to Subdivision F of the Petition already filed	9
Motion to Set Aside Conviction and Sentence and Grant Defendant a New Trial in the Circuit Court for the County of Oakland	16

INDEX TO CASES AND AUTHORITIES CITED

	Page
2 L. Ed. (2d) 1575	8
Edward Eckwerth, Petitioner vs. The People of the State of New York, 3 L. Ed. (2d) 925	8
Honigman's Michigan Court Rules, Rule 67	9

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Now comes the above named Petitioner by Andrew J. Transue, his attorney, and moves this Honorable Court for leave to file a supplement to the petition already filed for writ of certiorari to the Supreme Court of the State of Michigan for the following reasons:

Since July 17, 1959, Petitioner, Clifford B. Dye, has been in the Michigan State Prison at Jackson, Michigan serving a sentence imposed upon him in the matter presented to this Court. Mr. Dye did not see the petition for writ of certiorari until after the same had been printed and filed. The following communication was received by his attorney, Andrew J. Transue:

"October 21, 1959

• • •

"Dear Mr. Transue:

"This is to confirm our telephone conversation of October 20.

"The following is the message I received 'Tell Transue that their argument (re "tainted testimony" by Clark in taking stand after case had been closed by both sides) overlooked Taylor's opening statement that "Mr. Clark thinks he knows which shot hit him *but he does not know*" (see appendix of Taylor's opening statement). This shows that Taylor knew that Clark's last testimony that 2nd shot hit him was false.' • • •

"Very truly yours,

"(s) M. Elizabeth McCall
"M. Elizabeth McCall,
"Secretary to Mr. Dye."

Petitioner also moves the Court for leave to supplement the petition already filed in regard to subdivision F thereof; that Rule 23, Subdivision 1(f) may be more precisely complied with.

Andrew J. Transue,
Attorney for Petitioner.

Richard C. Fruit,
Of Counsel.

No. 460

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

CLIFFORD B. DYE,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

SUPPLEMENT TO A PETITION FILED OCTOBER 9, 1959 FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

QUESTION FOR REVIEW REFERRED TO AS QUESTION 3a FOR THE REASON THAT IT IS RELATED TO QUESTION 3 AND THE ARGUMENT MADE IN REGARD TO QUESTION 3 IS PARTLY APPLICABLE TO QUESTION 3a HERE SUBMITTED

3a. Where the Assistant Prosecuting Attorney, in his opening statement said (referring to the complaining witness, who was injured by being shot):

> "He seems to be quite sure as to which shot, fired at him, struck him, but he does not know * * *" (3a).

and the People's expert evidence shows that the gun was at least as close as 18 inches when Complainant Clark was shot (164a); and that the Assistant Prosecuting Attorney asked only the following questions of Complainant Clark on direct examination in the case in chief, and before the Defendant rested, in regard to the details of how Complainant was shot:

> "Q. Were you shot that day?
> A. Yes, sir.
> Q. By whom?
> A. Clifford Dye" (33a).

and then, after Petitioner testified that Complainant was accidentally shot (160a-161a) and in support of his claim of self-defense (St. Ct. 98a, 99a, 123a to 128a), and all the testimony in the case up to this point was consistent with Petitioner's claim of accident and self-defense; and then the Assistant Prosecuting Attorney recalled Complainant Clark in so-called rebuttal and brought out:

> "Mr. Dye reached his hand in his pocket and pulled out a gun and was playing with it or something and it went off in the ground. This was not minutes. This was seconds. He pulled the gun out and hit me in the stomach — eighteen feet apart. The next time he shot, the gun, he missed me by not over three feet, * * *" (127a),

did the Assistant Prosecuting Attorney intentionally and knowingly make an issue by false testimony?

ARGUMENT ON POINT 3a

The question submitted is a factual one and references to the record are made in the question itself in support of the Petitioner's contention that the Assistant Prosecuting Attorney, knowingly and intentionally used false testimony to make an issue for the jury and to obtain a conviction of Petitioner. In addition, when Complainant Clark was under cross-examination, and just as the Petitioner's attorney was starting to cross-examine Complainant Clark about how he was shot and the facts surrounding it, the Assistant Prosecuting Attorney said:

> "MR. TAYLOR: I was going to suggest at this time that we take the usual recess.
> THE COURT: We will recess for fifteen minutes" (43a).

After the recess, Petitioner's attorney then asked about the struggle between Petitioner and Complainant Clark, and Complainant Clark was asked:

> "Q. How did you have hold of Mr. Dye at the time he fell?

A. He had his hands up — by that time I had his hands up like this here. We went down together. We got tangled with the gate.

Q. You had hold of his wrists and as Mr. Dye fell, you fell on top of him or at the side of him, something of that nature?

A. Yes, sir.

Q. Was the gun discharged at that time?

A. No, sir. I couldn't say if it was. At that time that Mr. Dye and I fell, the gun was — we was on the ground" (41a).

The struggle was fifty feet or more from the point where Clark was when he first started to pursue Petitioner (St. Ct. 40a, and 40a and 126a). It occurred at a gate between the barnyard and Petitioner's house (See Exhibit 3, 5, 6 and 7, State Court Record, beginning at page 210a).

Mrs. Clark testified:

"Q. What was the position of the parties when the third shot was fired?

A. At that time I was so upset that I really only know just about what anyone would know in excitement as that but when the third shot was fired, they were either — it was the third or fourth shot because I am not sure how many shots. At that time they were tussling and they were back by the gate" (12a).

Mrs. Clark also testified:

"A. The last shot that was fired was when they were standing and they went to fall. The shot went off when they were standing or when they were falling, I couldn't — I mean, that's as near as I can tell you" (St. Ct. 53a).

The Assistant Prosecuting Attorney brought out from Complainant Clark on so-called rebuttal that Complainant Clark was shot when he had just come out of the barn and when Petitioner was standing at the corner of it as shown by Exhibit 3 (126a and St. Ct. 210a for the Exhibit 3); that Petitioner fired every shot that he fired when he

was standing in the same place (126a-127a). This, in spite of Clark's own testimony previously given:

> "Q. I am not asking you about when you were on the ground please. I am particularly concerned as Mr. Dye was in the process of falling.
>
> A. Falling to the ground?
>
> Q. Yes.
>
> A. When we was getting through that gate we got tangled up in the gate.
>
> Q. What happened then?
>
> A. We just went to the ground and Cliff was trying to get hold of the gun all the time. I finally got his arms up where I thought I could hold him until I got a few pains and I figured I was shot and I figured the best thing was to get out to there" (42a).

And he said:

> "Q. Was the gun discharged at that time?
>
> A. No, sir. I couldn't say if it was * * *" (41a).

All of the testimony at the close of the Defendant and Petitioner's case shows that there was a shot when the Petitioner and Complainant Clark were in a struggle up by the gate more than fifty feet from where they had started and to a point to where the Complainant Clark had pursued Petitioner; and all of the testimony shows that this is the shot that struck and injured the Complainant Clark. And it is with all of this knowledge and in this setting, including the statement which the Assistant Prosecuting Attorney himself made in his opening statement (referring to Complainant Clark):

> "He seems to be quite sure as to which shot, fired at him, struck him, but he does not know * * *" (3a),

all of which shows that the Assistant Prosecuting Attorney knew that the Complainant Clark was giving false testimony when he claimed he was shot when the Petitioner and Clark were 18 feet apart. This is vital testimony and this is the testimony that made an issue for the jury, as all of the other testimony was consistent with Petitioner's claim of accident and self-defense. The Minority Opinion

of the State Supreme Court shows that this was a very close case on the issue of self-defense with this testimony in:

> "Defendant pled self-defense and the burden of proof was upon the State to prove that it was not self-defense.
>
> "A grave and serious question as to whether the State had met this test was presented to the jury for determination. * * *" (165a).

Petitioner's present counsel did not represent Petitioner in the trial court. The argument here made is based on the record that we have.

The matters in the record that are set forth in support of question 3(a) and in the question itself, standing alone, would not have the probative force that they do have when the entire record is considered. The manner in which the case was tried and the unfair and prejudicial tactics of the Assistant Prosecuting Attorney and the ends that he went to in order to obtain a conviction, and when all of these matters are considered, then it is a reasonable conclusion that when the Assistant Prosecuting Attorney recalled Complainant Clark for so-called rebuttal, he knew that he had been told by Complainant Clark that he, Complainant Clark, did not know which shot hit him. But he was willing for Clark to take the witness stand and for him to say positively that he, Clark, was shot down behind the barn when he was 18 feet away from the Petitioner by the bullet after the first one that was fired from the gun.

The Assistant Prosecuting Attorney put Complainant Clark on the witness stand in so-called rebuttal and brought out positive testimony from Clark as above set forth, when he knew he had been told differently by Clark, when he knew that Clark had testified differently, when he knew that Clark's wife had testified differently, and that the Petitioner had testified differently, and, more than that, when he knew that his own witness, the police expert, said that the shot that injured Complainant Clark was fired within 18 inches from the end of the gun barrel; and the Assistant Prosecuting Attorney knew that the only time Complainant Clark and Petitioner were that close together was

up by the gate, fifty feet or more away from the place where Clark said he was shot in his so-called rebuttal testimony.

That knowing use by the state officials of perjured testimony, is want of due process, is shown by cases cited on page 33 of the original petition; and, particularly, the extensive annotation at 2 *L. Ed.* (2d) 1575, which cites many cases where the Federal Courts have given relief against state court convictions. Also, the case of *Edward Eckwerth, Petitioner vs. The People of the State of New York*, 3 L. Ed. (2d) 925, decided April 20, 1959, where Mr. Justice Harlan said:

> "I have now considered the papers submitted by the State which, I regret to say, included no memorandum or affidavit in opposition. Fully recognizing the shocking character of this crime, I nevertheless consider it my duty to grant petitioner's application. In light of the flat and unexplained contradiction relating to the episode of the dead woman's shoes between, on the one hand, the stenographer's minutes of the District Attorney's interrogation of petitioner on August 25, 1956, and Dr. Bradess' testimony and the District Attorney's summation, on the other hand, I cannot say that the petition for certiorari is so clearly devoid of a possible federal question that I should allow this man to go to his death before the Court has had an opportunity to consider his petition for certiorari, to which the State has not yet responded. The State's response is due May 4, 1959.
>
> "Accordingly, petitioner's execution will be stayed pending this Court's disposition of the petition for certiorari."

In the case at bar the Petitioner is a lawyer serving prison sentence and disbarment proceedings have been instituted against him.

SUPPLEMENT TO SUBDIVISION F OF THE PETITION ALREADY FILED

To more precisely comply with Subdivision 1(f) of Rule 23, the following is set forth in supplement of F in the petition now on file:

1. The stage in the proceedings in the Court of the first instance and in the Appellate Court at which and the manner in which the federal question sought to be reviewed by question one was raised, and passed on are:

Objection to testimony concerning a claimed felonious assault by Petitioner about three years previous, on rebuttal, was raised in the trial court, and overruled (133a-134a) in front of the jury.

The general objections against Petitioner's claim of repeated injection of prejudicial and collateral matters and innuendo were raised under paragraph 3(a) of the motion for new trial, appended to this amended petition.

Assignments of error have been abolished in Michigan: *Honigman's Michigan Court Rules*, (pocket supplement), comment on Rule 67; so that the points are raised by the Appellants' briefs in the Michigan Supreme Court.

Following is from Petitioner's Statement of Questions involved, in the Appellant's brief in the Michigan Supreme Court:

> "II.(a) Was the conduct of the Assistant Prosecuting Attorney unfair, improper, and prejudicial so as to constitute reversible error?
>
> "(b) Did the Court err in failing to hold the Assistant Prosecuting Attorney in check in the matters referred to in question (a)?
>
> "(d) Did the Court err in overruling the Respondent's request that a mistrial be declared?"

The last refers to a general motion for mistrial because of the prejudicial matter consistently introduced (76a).

This specific point was discussed on pages 69-76 of Appellant's brief in the Michigan Supreme Court, one copy of which has been filed with this Court ("previous gunplay").

As to this, and other collateral and prejudicial matters, the following is quoted from the motion for rehearing, in the Michigan Supreme Court, one copy of which was filed with this Court; and which motion was denied without opinion. The following appears at the end of the motion for rehearing:

> "For the reasons stated herein we submit the defendant was not accorded a fair and impartial trial in accordance with his guarantees under the Fourteenth Amendment of the Constitution of the United States of America, and we therefore respectfully request this Honorable Court to pass on this issue."

Under point III of the motion for rehearing, counsel said:

> "We respectfully submit that in holding that the respondent had a fair and impartial trial this court was under a misapprehension as to the facts and also misapplied the law,"

quoting the dissenting opinion, and citing at length prejudicial errors, along the lines set forth under points I and II of the Argument herein (pages 9-28 of the motion for rehearing).

The opinion of the minority on the injection of collateral and prejudicial matters, is set forth on page 8 of the Petition. The opinion of the majority of the Court, as to points 1 and 2 hereof, was (155a):

> "Although there is much in the transcript that might well have been omitted, we do not feel that the uncalled for matter in any way prejudiced the Defendant."

Objection was made in the trial court, and overruled, concerning the charge against the Petitioner of a collateral matter, to-wit: fraud on the Michigan Supreme Court in his application to practice law in the State of Michigan; when Mr. Dye was first questioned about it (113a); and, again, in connection with the rebuttal testimony of Donald F. Winters, Clerk of the Michigan Supreme Court, upon the offering of a letter, objections were made and

overruled, and the letter was received in evidence (119a). Subsequent objections and the rulings thereon in the trial court are shown in the Appellant's brief in the Michigan Supreme Court, pages 82-84. The manner in which the questions were raised in the Michigan Supreme Court is by questions set forth in the brief, which now take the place of assignments of error in Michigan practice.

The accusations of forgery were discussed on page 58 of Appellant's brief in the Michigan Supreme Court, and on page 83 of his Reply Brief in the State Supreme Court, and were disposed of as shown above.

The gun-in-brief-case point was discussed in the Appellant's Reply Brief in the Michigan Supreme Court, pages 90-91; and disposed of as indicated above.

2. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question two were raised and passed on are as follows:

The argumentative nature of the Assistant Prosecutor's opening statement was objected to, (4a) and the Court gave an admonishment. For the most part, objection was made to the Assistant Prosecutor's opening statement and the testimony offered to substantiate it at the time the testimony was offered.

The introduction of the gun permit to prejudice the Petitioner and to show by innuendo that he was either insane or had a criminal record was objected to, and a specific motion made for a mistrial (76a). It was discussed on pages 67,68 in the Appellant's brief in the State Supreme Court; and the disposition of this objection was as indicated in the manner herein set forth in regard to question number one.

Objections were made concerning Florida real estate (86a-90a); no ruling was made, but the question was withdrawn. Objections to these insinuations appear on pages 61-64 of Appellant's brief in the Michigan Supreme Court; and the motion for new trial, and the opinions of the Supreme Court, and the Motion for Rehearing were as discussed under question one above.

The question as to Petitioner's financial solvency was asked several times (89a-91a); and each time a ruling was made that the matter was irrelevant. This was discussed on page 63 of Appellant's brief in the Michigan Supreme Court, and the motion for new trial, and disposed of in the appellate court as discussed under question one herein.

The leading question to Reginald Crawford was objected to in the trial court (28a) and the jury told to disregard it.

The settlement between Complainant and Petitioner, so far as reading the decree was objected to (20a), and overruled (21a), and subsequent objections and rulings were as indicated under question one.

Reading the pleadings in the assault case was objected to in the trial court (26a), and overruled (26a). This was disposed of subsequently as indicated under question one.

The size of the milk check was objected to (94a) and the objection overruled (94a); and the matter was discussed as one of the "facts", in the majority opinion (the increasing size of the check, 151a).

The subject of Petitioner's prior marriages was brought up early in the trial (8a), and ruled irrelevant (8a). The same subject, objection and ruling, appear (69a). But the Court permitted the bill of complaint in a divorce case to be introduced over objections (82a-83a). Petitioner raised this in his brief in the Michigan Supreme Court, pages 54-63, 69; and it was disposed of as indicated under question one above.

As to Petitioner allegedly making no statement to the police, it was objected to as prejudicial (61a). The Court ruled that his failure to testify could not be commented on (62a); as it actually was; but it is not clear that he meant alleged failure to make a statement to the police. Objections were made to questioning of witness Bremer as to the significance of making statements to the police, and after objections, it was withdrawn (56a).

Petitioner objected to reflections on his alleged treatment of colored people in Appellant's brief in the Michigan Supreme Court, pages 78, 88. He also objected, in his Appellant's brief in the Michigan Supreme Court, pages 64-65, 87, 92, to reflections upon his professional

ethics; and to being referred to as "Lawyer Dye", Appellant's Reply brief in the Michigan Supreme Court, page 87.

The question that he had an alleged persecution complex, was objected to (96a). Points covered by this and preceding paragraph were to some extent discussed in the minority opinion; but disposed of as indicated at the beginning of question one herein.

The question about "I am the Law, Dye" was discussed in Appellant's brief in the Michigan Supreme Court, pages 70-71, and the minority opinion (165a) but disposed of by the majority as indicated above.

3. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question three were raised and passed on are as follows:

The question of the testimony as to the details of the shooting, including recalling Clark on rebuttal, was raised by a motion for directed verdict, at the close of the People's case (50a). It does not appear in full, but the following is taken from the Transcript (page 298ff):

> "• • • (the testimony) leaves us in the position where the only shot which could have caused the injury • • • came from Mr. Dye's gun while Mr. Clark had hold of his arms or hands."

It was again raised by the motion for new trial (paragraph 3a). 3 E

3a. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question three-a were raised and passed on are as follows:

The question of recalling Clark on rebuttal and a discussion of the Assistant Prosecuting Attorney's opening statement in regard to this testimony was set out at length in Appellant's Reply Brief in the Michigan Supreme Court, pages 56-57. The minority of the Court discussed the question of self-defense, as set forth in page 8 of the petition. The majority said there was sufficient evidence to support a verdict, and to deny the motion for di-

rected verdict (154a). The facts were again discussed in the motion for rehearing in the Michigan Supreme Court, one copy of which has been filed, on pages 2-8. This motion was denied without opinion.

4. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question four were raised and passed on are as follows:

Evidence of Petitioner's knowledge of prior violent acts by Clark, which had come to him from third parties, was offered and excluded (59a-60a). It was raised by paragraph 3 (a) of a motion for a new trial and on page 98 of Appellant's brief in the Michigan Supreme Court and page 100 of his Reply Brief in the Michigan Supreme Court, and pages 21-22 of the motion for rehearing in the State Supreme Court. As discussed on page 36 of the Petition filed, the majority of the State Supreme Court tacitly admitted that this was an error (155a).

5. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question five were raised and passed on are as follows:

A request to charge on the subject of self-defense appears in the State Court Appendix, page 216a, and this was one of the bases for the motion for new trial, paragraph 3 (d) appended hereto. This was discussed in the brief of Appellant in the Michigan Supreme Court, pages 98-117 and page 102 of the Reply Brief in that Court, including the law as to self-defense, and pages 24-28 of the Motion for Rehearing, which was denied without opinion. The charge given, as to self-defense, appears (144a-145a). The whole charge is found at page (135a). The majority of the State Supreme Court held that the charge was, as a whole, adequate (156a).

Other prejudicial and collateral matters, and innuendo, injected by the Assistant Prosecuting Attorney, too numerous to classify and discuss, appear in the appendix to the originial Petition. The fundamental question of whether Petitioner received a fair trial was raised and disposed of as set forth under question one hereof.

The sufficiency of raising the federal question, as a matter of law, is discussed on pages 39-41 of the original Petition.

Respectfully submitted,

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MOTION TO SET ASIDE CONVICTION AND SENTENCE AND GRANT DEFENDANT A NEW TRIAL

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

vs. No. 15576

CLIFFORD DYE.

Now comes Clifford Dye, defendant herein, by Clarence L. Smith, his attorney, and petitions this Honorable Court for an Order Setting aside the Conviction of said Defendant and Granting him a New Trial. In support of this petition, the following representations are submitted:

1. That claims of error in this petition are presented without the benefit of the transcript of testimony, but it is further represented that such testimony has been ordered and the court reporter's certificate, certifying the order of such transcript, was made as of March 8, 1956 depicting the order as of March 6, 1956.

2. That the defendant was found guilty by the verdict of a jury on March 1st, of the crime known as Assault with intent to do Great Bodily Harm, less than the Crime of Murder.

3. That from the memory and information Counsel now has, it is claimed that the following errors were committed in the trial of said cause, effecting a miscarriage of justice and a failure to afford the defendant a fair and impartial trial, in that:

(a) Under plea of self-defense, the Court refused to permit the defendant to recite in evidence various incidents of violence and brutality on the part of the complaining witness, which incidents were known to the defendant at the time of the alleged crime, by virtue of communications to the defendant by third parties, as distinguished from com-

munications to the defendant by the complaining witness himself or by direct observation of the defendant.

(b) That notwithstanding the extensive nature of the trial, extending in the point of time from February 15th to March 1st, the extensive nature of arguments by Counsel for the People And for the Defendant, extending for a period well in excess of four hours, that nevertheless, the Court did, before permitting the jurors to retire, instruct such jury in substance and effect, that they ought to pay proper respect to each other's opinions, and listen with a disposition, to be convinced to each other's arguments, and that the minority ought seriously to ask themselves if their doubts were reasonable and to concur with the majority if they could conscientiously do so.

(c) That throughout said trial, the Assistant Prosecutor made inferences and insinuations tending to prejudice the jury against the respondent, and that in at least two such instances, namely "Isn't it true that you have had five wives?" and in another instance, "Isn't it true that Dr. ..... certified that in a Probate Proceeding that you were suffering from hallucinations?"

(d) That the Court erred in his instructions by failing to give the defendant's theory of his defense as requested, and substituting therefore the Court's wording, which omitted any reference to the theory of self-defense as applied to the third and fourth shots involved in the evidence presented.

(e) That the verdict of the jury was against the great weight of the evidence, particularly in view of the State's testimony that the shot which struck the complaining witness must, of necessity, be fired from a gun shot not more than 18 inches from the complaining witness at the time, whereas the complaining witness testified that he was deliberately shot at a distance of 18 feet, and the complaining witness' wife testified that shots one, two, and

three were from distances of approximately 15 feet, and where the only evidence of any shot within 18 inches came from the testimony of the complaining witness' wife, who testified that shot number four was fired when the defendant was falling to the ground with the complaining witness holding the defendant's hands or arms at the time. The only other testimony on the subject was that the defendant himself, who testified that the fourth shot must have been the shot that struck the complaining witness, that the gun was fired while the complaining witness held the defendant's hand and as both parties fell to the ground, and at the moment the defendant, himself, struck the ground. There is further instance of testimony bearing on the question of a jury arrived at their verdict, which involved specific intent, attention was called to the testimony given by the defendant, and supported by Mrs. Clark, that immediately after the fourth shot, the complaining witness, for the first time, gave expression to the fact that he had been shot, and that the defendant then said in substance, "You are shot, I'll take you to the hospital." As a further incident bearing on the question of specific intent, the undisputed testimony is that from the time of the inception of the difficulties to the time of the final shot, the complaining witness traversed a distance from the southeast corner of the barn, to the northwest corner of the barn, and that at least the distance from approximately mid-way between the southeast corner of the barn and the northeast corner of the barn, to the point of the final shot outside the gate, was made in pursuit of the defendant by the complaining witness.

This motion is based upon the records and files in this cause and on the Affidavit of Clarence L. Smith, hereto attached.

(s) Clarence L. Smith,
Attorney for the Defendant.